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BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE APPLICATION
OF ICR WATER USERS ASSOCIATION,
INC. FOR A DETERMINATION OF THE
CURRENT FAIR VALUE OF ITS UTILITY
PLANT AND PROPERTY AND FOR
INCREASES IN ITS RATES AND CHARGES
FOR UTILITY SERVICES

DOCKET NO: W-02824A-07-0388

PREHEARING LEGAL
MEMORANDUM REGARDING
GROUNDWATER LAW

In this proceeding, there has been discussion regarding the use of groundwater to irrigate the golf course. It has even been suggested that the Intervener, Talking Rock Golf Club, LLC ("TRGC"), is acting in a manner that somehow undercuts Arizona law with respect to the use of groundwater. To begin with, the Talking Rock community is designed in a manner intended to conserve and minimize the use of groundwater. Testimony of Craig L. Krumwiede filed on April 14, 2008 at 7-8. These efforts extend to the golf course, where steps have and continue to be taken to minimize groundwater use, including using all available effluent for irrigation. *Id.* These efforts continue to be successful, as reflected in TRGC's reduction in water use by 15 percent over the past year. Supplemental Testimony of Craig L. Krumwiede filed on November 14, 2008 at 4. These steps are, however, voluntary, because the use of groundwater for landscape irrigation and lake fill at the golf course is consistent with Arizona law. Such law is the subject of this Prehearing Legal Memorandum Regarding Groundwater Law, which filing is made to further aid the Commission in addressing the issues raised in this rate case.

1 **I. THE EXTENT OF REGULATION OF GROUNDWATER WITHDRAWALS**
2 **AND USE IN ARIZONA DEPENDS UPON THE LOCATION OF THE**
3 **GROUNDWATER WITHDRAWAL AND USE.**

4 In 1980, the Arizona legislature adopted the Arizona Groundwater Management
5 Code (the "Groundwater Code"). A.R.S. §§ 45-402 – 45-704. The Groundwater Code
6 imposed extensive regulations on groundwater withdrawals and uses within specific areas
7 of the State, referred to as "Active Management Areas" or "AMAs". The Active
8 Management Areas are those areas of the State that experienced extensive groundwater
9 pumping prior to 1980. Within the AMAs, groundwater may be withdrawn only in
10 accordance with the Groundwater Code. A.R.S. § 45-451(A). Groundwater may not be
11 withdrawn unless pursuant to a groundwater right, a service area right, a permit issued by
12 the Arizona Department of Water Resources ("ADWR") or from small domestic wells.

13 In addition to Active Management Areas, the Groundwater Code established
14 Irrigation Non-Expansion Areas ("INAs"). For INAs, the Groundwater Code focused on
15 limiting the acreage that may be used for agricultural purposes. Generally speaking, after
16 establishment of an INA, no additional acreage may be irrigated for farming purposes
17 with any source of water within that INA. A.R.S § 45-437(A); 45-434(A). There are
18 currently three INAs within Arizona.

19 For lands that are located outside the Active Management Areas and outside the
20 INAs, the Groundwater Code imposes very few limitations or restrictions on groundwater
21 pumping. The wells used for the irrigation of the Talking Rock Golf Course are all
22 located outside the Active Management Areas and outside the INAs, as is the Talking
23 Rock Golf Course itself.

1 **II. FOR GROUNDWATER WITHDRAWALS OCCURRING OUTSIDE AMAS,**
2 **ARIZONA FOLLOWS THE DOCTRINE OF REASONABLE USE, AS**
3 **THAT DOCTRINE HAS BEEN MODIFIED BY STATUTE.**

4 **A. Arizona Courts Adopted The Doctrine Of Reasonable Use To Address**
5 **The Rights Of Landowners To Withdraw Groundwater.**

6 Arizona follows a bifurcated system of water law. That is to say, the diversion and
7 use of surface water is governed by the doctrine of prior appropriation. In contrast, the
8 withdrawal and use of groundwater is subject to the doctrine of reasonable use. This
9 divided system has been in place in Arizona for many decades. *Maricopa County*
10 *Municipal Water Conservation District No. 1 v. Southwest Cotton*, 39 Ariz. 65, 4 P.2d 369
11 (Ariz. 1931); *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (Ariz. 1953), reversing
12 *Bristor v. Cheatham*, 73 Ariz. 228, 240 P.2d 185 (Ariz. 1952). As noted above, within the
13 Active Management Areas of the State, the Arizona legislature significantly modified the
14 doctrine of reasonable use through its adoption of the Groundwater Code.

15 The doctrine of reasonable use is a common law doctrine established by the courts.
16 Under that doctrine as originally adopted, a landowner has the right to withdraw
17 groundwater for a reasonable and beneficial purpose, even if that withdrawal has an
18 impact on the ability of a neighboring landowner to withdraw water. The doctrine was
19 formally adopted by Arizona in *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (Ariz.
20 1953), reversing *Bristor v. Cheatham*, 73 Ariz. 228, 240 P.2d 185 (Ariz. 1952). In its
21 second decision, the Arizona Supreme Court stated that the doctrine of reasonable use
22 “does not prevent the extraction of ground water subjacent to the soil so long as it is taken
23 in connection with a beneficial enjoyment of the land from which it is taken. If it is
24 diverted for the purpose of making reasonable use of the land from which it is taken, there
25 is no liability incurred to an adjoining owner for a resulting damage.” *Id.* at 237-238, 255
26 P.2d at 180. This statement succinctly states the essential points of the doctrine of
 reasonable use.

1 **B. Through Its Adoption Of The Groundwater Code, The Arizona**
2 **Legislature Retained The Doctrine Of Reasonable Use For Areas**
3 **Outside Of Active Management Areas And Modified The Reasonable**
4 **Use Doctrine's Limitations On The Transportation Of Groundwater.**

5 As originally articulated, the doctrine of reasonable use provided that a well owner
6 had the unlimited right to withdraw groundwater for a beneficial use on the land from
7 which the water was withdrawn. However, if groundwater were transported away from
8 the well and used at another location, another party could assert that they were damaged
9 by the withdrawal and transportation of the water. This link between the place of
10 withdrawal and the place of use led to a number of disputes and controversial court
11 decisions pertaining to the transportation of groundwater.¹ When it adopted the
12 Groundwater Code, the Arizona legislature codified the doctrine of reasonable use for
13 land located outside the AMAs, and addressed the controversy over groundwater
14 transportation. With regard to these two important points, the statute simply states that:

15 “In areas outside of active management areas, a person may:

16 1. Withdraw and use groundwater for reasonable and
17 beneficial use, except as provided in article 8.1 of this
18 chapter.

19 2. Transport groundwater pursuant to articles 8 and 8.1 of
20 this chapter.”

21 A.R.S. § 45-453 (1) & (2).

22 Articles 8 and 8.1 of the Groundwater Code pertain to the transportation of
23 groundwater. For groundwater that is withdrawn outside an AMA, the general rules are
24 that:

25 ¹ *Jarvis v. State Land Dept.*, 104 Ariz. 527, 456 P.2d 385 (Ariz. 1969), mod., 106 Ariz.
26 506, 479 P.2d 169 (Ariz. 1970), mod., 113 Ariz. 230, 550 P.2d 227 (Ariz. 1976)
 (pertaining to the transportation of groundwater by the City of Tucson); *Farmers*
 Investment Co. v. Bettwy, 113 Ariz. 520, 558 P.2d 14 (1976) (pertaining to the
 transportation of groundwater by the City of Tucson and certain mining companies).

1 a. Groundwater may be transported “[w]ithin a subbasin of a groundwater
2 basin or within a groundwater basin, if there are no subbasins, without the payment of
3 damages.” A.R.S. § 45-544(A)(1)(a).

4 b. Groundwater may be transported “[b]etween subbasins of a groundwater
5 basin, subject to the payment of damages.” A.R.S. § 45-544(A)(1)(b).

6 c. Except as specifically provided by statute, “[g]roundwater shall not be
7 transported away from a groundwater basin.” A.R.S. § 45-544(A)(2).

8 These statutes regarding transportation of groundwater changed the common law
9 rule in two important respects. First, the statutes now permit the unfettered transportation
10 of groundwater within groundwater subbasins (or groundwater basins, if there are no
11 subbasins), and no damages are available to a neighboring property owner for that
12 withdrawal and transportation. Second, the statutes do not require that the groundwater be
13 withdrawn or used by the owner of land. Thus, a well may be operated under a lease or an
14 easement at the point of withdrawal, and the groundwater may be delivered to land that is
15 owned independent of the ownership of the well. The statute does not require that the
16 person withdrawing or using the groundwater must own the land where the groundwater is
17 withdrawn or where the groundwater is used. In general, then, these statutes broaden the
18 right to utilize groundwater within a groundwater subbasin (or basin, if there is no
19 subbasin), so long as that groundwater subbasin or basin is located outside the AMAs.

20 The constitutionality of the Groundwater Code was upheld in *Town of Chino*
21 *Valley v. City of Prescott*, 131 Ariz. 78, 638 P. 2d 1324 (Ariz. 1981). In that case, the
22 Town challenged those provisions of the Groundwater Code that allow the transportation
23 of groundwater within subbasins of an Active Management Area, without the payment of
24 damages. The Court determined that the owner of land does not own the molecules of
25 groundwater that exist beneath the surface; rather the landowner has the right to the
26 ‘usufruct’ of the water – the right to enjoy the use of the water. Ownership of the

1 groundwater does not occur until such time as the water is withdrawn. *Id.* at 82, 638 P.2d
2 at 1328. The Court held that the Groundwater Code “does not deny appellants due
3 process of law and does not require that they be paid compensation for any possible
4 diminution of their rights which they may have had under the doctrine of reasonable use.”
5 *Id.* at 84, 638 P.2d at 1330. Thus, the Court agreed that the legislature could modify the
6 doctrine of reasonable use to permit some transportation and use of groundwater away
7 from the location of withdrawal.

8 **III. THE USE OF GROUNDWATER FOR GOLF COURSE IRRIGATION IS A**
9 **REASONABLE AND BENEFICIAL USE OF WATER IN ARIZONA.**

10 As discussed above, outside of the Active Management Areas, Arizona law permits
11 the withdrawal and use of groundwater for reasonable and beneficial purposes, subject to
12 limitations on the transportation of the groundwater. The statutes do not define the term
13 ‘reasonable and beneficial use.’ Nor is there Arizona caselaw specifically analyzing
14 whether or not the use of groundwater for golf course irrigation is a reasonable and
15 beneficial use. Nonetheless, it is clear from caselaw, other provisions of the Groundwater
16 Code and from the Management Plans issued by the Arizona Department of Water
17 Resources (“ADWR”) that the use of groundwater on golf courses is a reasonable and
18 beneficial use of groundwater.

19 **A. Under The Reasonable Use Doctrine, A Wide Spectrum Of Uses Of**
20 **Water Has Been Recognized As Reasonable.**

21 The withdrawal and use of groundwater outside the Active Management Areas is
22 now governed by the statutory requirement of a reasonable and beneficial use. As noted
23 above, the statute modified the reasonable use doctrine by allowing the transportation of
24 groundwater away from the location of withdrawal. Case law addressing the reasonable
25 use doctrine, however, remain relevant in considering what uses of groundwater are
26 reasonable.

1 In *Bristor v. Cheatham*, the Arizona Supreme Court adopted the reasonable use
2 doctrine and noted that “[t]he principal difficulty in the application of the reasonable use
3 doctrine is in determining what is reasonable use. . . . What is reasonable use must
4 depend to a great extent upon many factors, such as the persons involved, the nature of
5 their use and all the facts and circumstances pertinent to the issue. *Id.* at 237, 255 P.2d at
6 179. The Court cited with favor an Oklahoma decision stating that the reasonable use
7 doctrine does not prevent the use of groundwater for “agriculture, manufacturing,
8 irrigation or otherwise; nor does it prevent any reasonable development of [the
9 withdrawer’s] land by mining or the like, although the underground waters of neighboring
10 proprietors may thus be interfered with or diverted;” *Id.* at 238, 255 P. 2d at 180,
11 citing *Canada v. City of Shawnee*, 179 Okla. 53, 64 P.2d 694 (1936). A similar
12 conclusion was reached in *Higday v. Nickolaus*, 469 S.W.2d 859, 866 (Mo. App. 1971)
13 (explaining that reasonable uses include agriculture, manufacturing, irrigation, and
14 mining). Courts have also determined that other uses of groundwater are reasonable, such
15 as de-watering property for industrial, quarrying or sand and gravel operations, and other
16 development purposes. *Brady v. Abbott Lab.*, 433 F.3d 679, 683 (9th Cir. 2005) (finding
17 that reasonable use includes withdrawing water in order to lower the groundwater table,
18 thereby accommodating the expansion of a company’s manufacturing facilities²); *Evans v.*
19 *City of Seattle*, 47 P.2d 984, 988 (Wash. 1935) (cited with approval by the Arizona
20 Supreme Court in *Bristor v. Cheatham*, 75 Ariz. 227, 235, 255 P.2d 173, 178 (Ariz.
21 1953)) (concluding that draining a gravel pit was a reasonable use); *Bayer v. Nello L. Teer*
22 *Co.*, 124 S.E.2d 552, 559 (N.C. 1962) (holding that the use of groundwater in mining or
23 quarrying operations are reasonable uses); *Finley v. Teeter Stone, Inc.*, 248 A.2d 106, 113-

24
25 ² The Ninth Circuit in this case followed the reasonable use doctrine, but overlooked the
26 Groundwater Code’s impact on the reasonable use doctrine within the AMAs and on those
Arizona decisions issued prior to the enactment of the Groundwater Code.

1 14 (Md. 1968) (finding that the pumping of percolating water from a quarry by a
2 quarrying company was a reasonable use).

3 The use of groundwater for the development of a golf course is a reasonable and
4 beneficial use of that groundwater. Golf courses are legitimate and significant businesses,
5 providing employment opportunities and contributing to the tourism industry of the State.
6 For example, approximately 80 people are employed at the golf course at the Talking
7 Rock Community. Testimony of Craig Krumwiede filed on April 14, 2008 at 5. As a
8 business, golf courses should be treated no differently than other industries that utilize
9 groundwater for their operations. Having a golf course as a community amenity increases
10 the values of the residential lots within the community, thereby improving the property tax
11 base of the local government. Property taxes are also levied on the golf course itself, and
12 sales taxes are collected on its day-to-day operations. Golf courses also provide
13 recreational enjoyment to their users, and they provide open space to their communities.
14 For these and other reasons, the use of groundwater for golf course watering is a
15 reasonable and beneficial use of that water.

16 **B. The Use Of Groundwater For Golf Course Purposes Is Allowed As An**
17 **‘Industrial Use’ Within The Active Management Areas.**

18 The Groundwater Code mandates that ADWR periodically promulgate
19 Management Plans for each of the AMAs. A.R.S. §§ 45-461 – 45-575. The State is
20 currently in the third management period (2000 – 2010) and, pursuant to A.R.S. § 45-566,
21 ADWR issued a Third Management Plan for all five of the AMAs in 1999. The
22 Groundwater Code requires that Management Plans include water conservation
23 requirements for three categories of water user – agricultural, municipal and industrial.
24 The Groundwater Code defines an ‘industrial use’ as a non-farming use of water that is
25 not supplied by a city, town or private water company. A.R.S. § 45-561(5). With regard
26 to industrial uses of water, the Groundwater Code requires that ADWR “[s]hall establish

1 in each plan, . . . , additional conservation requirements for all non-irrigation uses of
2 groundwater” A.R.S. § 45-566(A)(2). In all of these Management Plans, golf
3 courses are characterized as industrial users of water, along with other ‘turf-related
4 facilities’, such as larger parks, common areas and cemeteries. *See*, Third Management
5 Plan for Phoenix Active Management Area 2000 -- 2010, § 6.3.7; Third Management
6 Plan for Tucson Active Management Area 2000 – 2010, § 6.3.8; Third Management Plan
7 for Prescott Active Management Area 2000 – 2010, § 6.3.7; Third Management Plan for
8 Pinal Active Management Area 2000 – 2010, § 6.3.8; and Third Management Plan for
9 Santa Cruz Active Management Area 2000 – 2010, § 6.3.8. Other industrial users of
10 water covered by particular Management Plans are sand and gravel facilities, power
11 plants, large-scale cooling facilities, dairies, feed lots and mines. All of these facilities are
12 subject to the water conservation requirements contained within the Management Plans.

13 Nowhere in either the Groundwater Code or in the Management Plans are golf
14 courses prohibited from using groundwater. Instead, through the Management Plans,
15 ADWR has established water conservation requirements for golf courses, and other
16 industrial users, that allow these facilities to continue operating within a water budget
17 calculated as provided in the Management Plans. By allowing the operation of golf
18 courses within the AMAs, where groundwater use is regulated most highly by the State,
19 the State has recognized that the use of groundwater at golf courses is a valid and
20 legitimate use of this resource. Essentially, the State has chosen to treat golf courses as
21 businesses that utilize significant amounts of water, as do other businesses, such as sand
22 and gravel operations, dairies and feed lots, and to control the amount of the groundwater
23 used at these facilities.

24 **C. The State Has Imposed Very Few Absolute Prohibitions On The Use Of**
25 **Groundwater, Even Within The Active Management Areas.**

26 Through the Groundwater Code and the Management Plans, the State legislature

1 has generally chosen to limit the withdrawal and use of groundwater within the AMAs
2 through a complicated system of rights and permits and through various conservation
3 measures. However, there are only a few instances where the legislation has expressly
4 prohibited the use of groundwater for a particular purpose. For example, under A.R.S. §
5 45-452(A), no new agricultural acreage may be irrigated with groundwater or other water
6 sources within the AMAs. As another example, under A.R.S. § 45-132, neither
7 groundwater nor any other type of water may be used to fill a new lake located within the
8 AMAs, except under specific limited exceptions. Thus, where it is inclined to do so, the
9 legislature has been willing to impose severe restrictions on a specific purpose for which
10 groundwater is used within the AMAs. It has not chosen to so prohibit the use of
11 groundwater to irrigate golf courses within the AMAs or anywhere else in the State.

12 **IV. CONCLUSION.**

13 In summary, while views may differ on the use of groundwater for golf course
14 landscape irrigation and lake fill, the law in Arizona is clear, and TRGC's use of
15 groundwater on its golf course is entirely consistent with the Arizona's Groundwater
16 Code.

17
18 RESPECTFULLY SUBMITTED this 14th day of November, 2008.

19 FENNEMORE CRAIG, P.C.

20
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1 **ORIGINAL** and thirteen (13) copies of the
2 foregoing filed this 14th day of November, 2008 with:

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5 1200 W. Washington St.
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7 **COPY** of the foregoing hand delivered
8 this 14th day of November, 2008, to:

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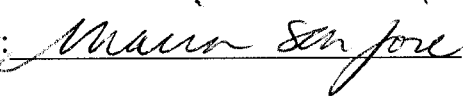
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